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The "Partial-Birth Abortion" Ban: Health Care in the Shadow of Criminal Liability, Panel II, The Path Ahead: Legal Challenges and Responses

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**THE “PARTIAL-BIRTH ABORTION” BAN:
HEALTH CARE IN THE SHADOW OF
CRIMINAL LIABILITY**

**PANEL II, THE PATH AHEAD: LEGAL
CHALLENGES AND RESPONSES**

The following is an edited transcript of Talcott Camp’s presentation on the federal so-called “partial-birth abortion” ban. Ms. Camp’s comments consisted of an informal overview and analysis of the jurisprudence surrounding *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).*

I’m really honored to follow that last panel of physician-providers, because those folks are heroes. They are keeping women safe and managing to do so without violating that hideous law in the face of a Supreme Court decision that is just shameful.

This is the story of the Federal Abortion Ban, the so-called “partial-birth abortion” ban.¹ It’s a story that starts long before this federal law was passed, and it’s a story in which you want to keep your eye on two bouncing balls: (1) Justice Kennedy’s vote, and (2) how the Court treats women’s decision-making capacity.

I. *ROE AND DOE*

In 1973, the Supreme Court held in *Roe v. Wade*² and *Doe v.*

* Deputy Director, American Civil Liberties Union Reproductive Freedom Project.

¹ Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2008).

² *Roe v. Wade*, 410 U.S. 113, 164–66 (1973).

*Bolton*³ that the Constitution protects a woman's right to choose to terminate her pregnancy. The Court established the right as fundamental and made clear that abortion restrictions were therefore subject to strict scrutiny, the toughest level of review.

Most abortion restrictions passed after *Roe* were struck down as unconstitutional, but a couple of important ones were, sadly, upheld. First, under *Roe* and *Doe*, the Court upheld restrictions on low-income women's access to abortion.⁴ This allowed states and the federal government to deny coverage for abortion services in Medicaid programs, even though those programs covered pre-natal care and labor and delivery services. Second, the Court upheld state-mandated parental involvement in young women's abortion decisions.⁵ These are notable exceptions: in those days the Court generally struck down the kinds of restrictions we now see all over the country, such as biased counseling requirements and state-mandated delays.⁶ The Court struck those restrictions down under the strict scrutiny standard established in *Roe* and *Doe*.⁷

What was not so good about *Roe* was the Court's almost exclusive focus on physician discretion.⁸ Don't get me wrong: I love physician discretion. But the *Roe* Court focused on physician discretion almost to the exclusion of the woman's decision-making power, and *Roe* therefore doesn't reflect the extent to which the ability to make the decision is central to women's lives.

³ *Doe v. Bolton*, 410 U.S. 179, 201 (1973).

⁴ *See Harris v. McRae*, 448 U.S. 297 (1980); *Maier v. Roe*, 432 U.S. 464 (1977).

⁵ *See Bellotti v. Baird*, 443 U.S. 622 (1979) (outlining constitutional requirements for parental involvement mandates).

⁶ *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 881–87 (1992) (upholding Pennsylvania biased counseling and mandatory delay requirement); *see also* NARAL Pro-Choice America, Fast Facts – Biased Counseling & Mandatory Delays, http://www.naral.org/choice-action-center/in_your_state/who-decides/fast-facts/biased_counseling.html (last visited Oct. 16, 2008) (listing current state laws).

⁷ *See, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759–65 (1986).

⁸ *See Roe v. Wade*, 410 U.S. 113, 153, 163, 165 (1973).

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There was almost an assumption in *Roe* that a woman who was unmarried and pregnant would of course want to avoid the seemingly immutable shame of so-called “unwed motherhood.” So in that sense, *Roe* does not reflect the world I’d like to see, in which women—whether single or married, straight or lesbian, low income or middle class—are able to choose to terminate a pregnancy or continue it, and, regardless of their choice, enjoy our support, rather than our shaming judgment. But, hey—*Roe* established strict scrutiny, and I’ll take that any day.

II. *CASEY*

In 1992, the Supreme Court essentially demoted the right to choose to terminate a pregnancy in *Planned Parenthood v. Casey*.⁹ Rather than strict scrutiny, restrictions on abortion are now judged under *Casey*’s far more deferential “undue burden” standard.¹⁰ Under *Casey*’s undue burden standard, the Court has upheld restrictions that it struck down under *Roe*, such as biased counseling and mandatory delay requirements.¹¹ In *Casey* itself, the Court upheld essentially every provision of Pennsylvania’s omnibus abortion regulation, with one exception: the Court struck down the requirement that married women notify their husbands before terminating a pregnancy.¹²

As an interesting aside, before *Casey* reached the Supreme Court, the case was before a panel of the United States Court of Appeals for the Third Circuit.¹³ The panel did essentially what the Supreme Court would later do: it upheld everything except the spousal notification requirement.¹⁴ One judge on the panel dissented from the decision to strike the spousal notice

⁹ See *Casey*, 505 U.S. at 833, 872, 876–78.

¹⁰ See *id.*

¹¹ See *id.* at 881–83, 887.

¹² *Id.* at 893–94, 898.

¹³ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991).

¹⁴ *Id.* at 710–11.

requirement: then Judge, now Justice, Samuel Alito.¹⁵

So back to the Supreme Court: while demoting the right and upholding a bevy of new restrictions was awful, there was an upside to *Casey* as well. The Court treated women's decision-making as central. The controlling plurality opinion in *Casey* said:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁶

Now, there are certainly other parts of *Casey* that are problematic, including certain other passages that also treat women's decision-making.¹⁷ But in that passage, the *Casey* plurality said—I think quite beautifully—that at the center of reproductive liberty is not merely the ability to terminate versus continue a pregnancy, but the ability to form the beliefs that undergird that decision. That seems to me to be a happy evolution from the tenor of *Roe*.

In *Casey*, Justice Kennedy cast the critical vote that made that opinion the controlling plurality opinion. So keep your eye on Justice Kennedy.

III. *STENBERG V. CARHART (CARHART I)*

In 2000, eight years after *Casey* was decided, and applying *Casey*'s undue burden standard, the Supreme Court struck down Nebraska's so-called "partial-birth abortion" ban in *Stenberg v. Carhart*, or *Carhart I*¹⁸ (as distinct from last year's decision, *Gonzales v. Carhart*, or *Carhart II*¹⁹).

¹⁵ *Id.* at 720 (Alito, J., dissenting).

¹⁶ *Casey*, 505 U.S. at 851.

¹⁷ *See, e.g., id.* at 883 (permitting state to enact laws designed to "ensur[e]" that the woman's "decision . . . is mature").

¹⁸ *Stenberg v. Carhart (Carhart I)*, 530 U.S. 914 (2000).

¹⁹ *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 127 S. Ct. 1610 (2007).

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To provide some extremely brief background on abortion: there are a little over one million abortions every year in this country.²⁰ About 90% occur in the first trimester.²¹ The other 10% occur in the second trimester,²² a pre-viability period consisting of the fourth, fifth, and sixth months of pregnancy, when the fetus is not able to survive outside the uterus. Of those 10% of abortions in this country that occur in the second trimester, over 95% are dilation and evacuation procedures (D&Es),²³ which you heard about in the first panel.²⁴

So, back again to the Supreme Court. In *Carhart I*, applying *Casey*'s undue burden standard, the Court struck the Nebraska ban on two grounds.²⁵ First, it was broad.²⁶ Rather than restrict only the intact variation of D&E, the ban potentially reached all D&Es, and would therefore constitute an almost complete ban on second-trimester, pre-viability procedures. The Nebraska law, for example, did not include the word “intact.”²⁷

Second, the Court struck the ban because even if it had been narrowly targeted to intact D&E procedures, it would have been unconstitutional because it lacked a health exception.²⁸

How did the Court reach that decision? First of all, the

²⁰ Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 1, 9, <http://www.guttmacher.org/pubs/journals/4000608.pdf> (estimating that there were 1.2 million induced abortions in the U.S. in 2005).

²¹ LILO T. STRAUSS ET AL., ABORTION SURVEILLANCE -- UNITED STATES, 2004 at Table 18 (MMWR Surveillance Summaries. 56: 1-33, 2007), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5609a1.htm>.

²² *Id.*

²³ *Id.*

²⁴ As the morning panelists did not submit comments for publication, see Brief of the American College of Obstetricians and Gynecologists as Amicus Curiae Supporting Respondents, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (Nos. 05-380, 1382), 2006 WL 2867888 (describing D&E procedures) [hereinafter Brief for ACOG as Amicus Curiae Supporting Respondents].

²⁵ *Carhart I*, 530 U.S. 914, 930 (2000).

²⁶ *Id.*

²⁷ *Id.* at 938–39.

²⁸ *Id.* at 937–38.

physicians who challenged the law on behalf of themselves and their patients had shown substantial medical authority demonstrating that the law would endanger women's health. For example, the American College of Obstetricians and Gynecologists (ACOG) submitted an *amicus* brief, a very beautiful *amicus* brief, explaining why this law would harm women's health.²⁹ Yet the Defendant—the Nebraska Attorney General—had indeed shown what you might call a “tie.”³⁰ He had shown that there was disagreement within the medical community about whether banning these procedures would endanger women. He didn't show nearly the substantial medical authority that the plaintiff-physicians did, but he certainly showed some medical disagreement.³¹

The Court held that when there is such a “tie,” the Constitution requires erring on the side of protecting women's health.³² A “tie” goes in favor of women's health. That was the Court's reasoning in striking the Nebraska ban for lack of a health exception in 2000.

So, on those two grounds—the breadth of the Nebraska ban and its lack of a health exception—the Court applied *Roe*, *Doe*, and *Casey*, and held that *Casey*'s undue burden standard required striking down the ban.³³ That was a 5-4 decision.

Justice Kennedy, whose vote in *Casey* had made the undue burden standard controlling, dissented in *Carhart I*. He insisted that *Casey* didn't require striking the Nebraska ban.³⁴ Applying *Casey* correctly, he said, would result in upholding the Nebraska ban.

Justice Scalia also dissented. He agreed with Justice Kennedy that the Nebraska ban should have been held constitutional, but

²⁹ See Brief for ACOG as Amicus Curiae Supporting Respondents, *Carhart I*, 530 U.S. 914 (2000) (No. 99-830), 2000 WL 340117.

³⁰ *Carhart I*, 530 U.S. at 933–36.

³¹ *Id.* at 937–38.

³² *Id.*

³³ *Id.* at 921–22, 930–31.

³⁴ *Id.* at 956–79 (Kennedy, J., dissenting).

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he disagreed about the applicable standard and what it meant.³⁵ Scalia said that the majority was right: that applying *Casey*'s undue burden standard did indeed require striking the ban. And that is why, he argued, the Court should overturn *Casey*.³⁶ So Scalia agreed with the majority in *Carhart I* that *Casey* required striking the ban, but that led him to conclude that *Casey* should be overturned.

Let's take a slight diversion from reproductive rights cases. Three years after *Carhart I*, the Court issued its decision in *Lawrence v. Texas*, which struck down Texas's sodomy ban.³⁷ *Lawrence* overturned *Bowers v. Hardwick*, a 1986 decision upholding a Georgia sodomy ban as constitutional.³⁸ So the 2003 *Lawrence* decision overturned *Bowers*, which was almost 20 years old at the time the Court issued *Lawrence*.

Justice Kennedy wrote the decision in *Lawrence*. In overturning *Bowers*, he said: “Two principal cases decided after *Bowers* cast its holding into even more doubt In explaining the respect the Constitution demands for autonomy of the person in making these choices, we stated as follows”³⁹ He then quoted *Casey* as one of the two principal decisions that cast doubt on the constitutionality of criminal sodomy bans.⁴⁰ What part of *Casey* does he quote? Exactly that part I read a few minutes ago:

At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁴¹

So with great appreciation, Justice Kennedy quoted the loftiest rhetoric from *Casey*, the part that talks about the woman's

³⁵ *See id.* at 953–55 (Scalia, J., dissenting).

³⁶ *Id.*

³⁷ *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

³⁸ *Id.* at 578; *Bowers v. Hardwick*, 478 U.S. 186 (1986).

³⁹ *Lawrence*, 539 U.S. at 573–74.

⁴⁰ *Id.*

⁴¹ *Id.* at 574 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)).

decision-making capacity that is central to reproductive liberty. But just watch what Justice Kennedy does next.

IV. *GONZALES V. CARHART (CARHART II)*

In *Gonzales v. Carhart (Carhart II)*, four years after striking the sodomy ban in *Lawrence* and seven years after striking the Nebraska abortion ban in *Carhart I*, the Court upheld the Federal Abortion Ban in an opinion written by none other than Justice Kennedy.⁴² And that ruling, also a 5-4 decision, is what has brought us here today.

After the *Lawrence* decision, where Justice Kennedy quoted *Casey* so appreciatively, I had confidence that he was not going to vote to overturn *Casey*. But I had a sense we were going to lose *Carhart II*, even though we had won the Nebraska abortion ban case seven years before.

What had changed from 2000, when the Court reviewed the Nebraska ban, to 2007, when it reviewed the federal ban? First, Chief Justice Rehnquist had been replaced by John Roberts, which did not change the outcome: Rehnquist dissented in 2000, voting to uphold the Nebraska ban,⁴³ just as Roberts would vote to uphold the federal ban in 2007. However, Justice O'Connor had been replaced by Samuel Alito, who, recall, as a judge on the Third Circuit had voted to uphold Pennsylvania's spousal notification requirement in 1991.⁴⁴ While I thought he would vote to uphold the federal ban, which he did, and I thought we were going to lose, I didn't think we were going to lose quite so badly.

In *Carhart II*, Justice Kennedy wrote the Court's decision upholding the Federal Abortion Ban in the face of the same two claims based on which the Court had struck the Nebraska ban: that it was broad and that it lacked a health exception.⁴⁵ The Court upheld the federal ban on both grounds, and yet stated that

⁴² *Carhart II*, 127 S. Ct. 1610, 1639 (2007).

⁴³ *Carhart I*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting).

⁴⁴ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 719 (3d Cir. 1991) (Alito, J., dissenting).

⁴⁵ See *Carhart II*, 127 S. Ct. at 1627, 1639.

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it was not overturning any precedent, including *Carhart I*.⁴⁶ Indeed, the Court stated that it was simply applying *Casey*.⁴⁷

First, the breadth claim: The physician-plaintiffs who challenged the federal law claimed that it reached much more than intact D&E. This law, like the Nebraska law, did not include the word “intact,”⁴⁸ and the Court did not read the word “intact” into it. It is true that there are many places in the decision that distinguish between intact D&E and what Justice Kennedy calls “standard D&E,”⁴⁹ and I think we can assume that “standard” generally means “not intact.” And doctors and the attorneys who advise them should get as much mileage as possible out of that distinction, because it does provide some protection.

Unfortunately, though, there is also this: “The Act excludes *most* D&Es in which the fetus is removed in pieces, not intact.”⁵⁰ It is difficult to know which ones are on the right side of the line and which ones are on the wrong side of the line. “Most” does not mean “all” and the decision gives no indication of just where the line is.

Now, on the question of whether that holding on breadth overturned any precedent: The Court said that it did not because the federal law was in fact narrower than the Nebraska law.⁵¹ In light of the wording of the two statutes and their interaction with actual medical practice, that reasoning is not convincing, but it is understandable: the Nebraska and federal bans are indeed worded differently.

On the health holding, however, the Court’s insistence that it overturned no precedent is a tougher stretch.⁵² The Court upheld the federal law, without a health exception, notwithstanding that the justices recognized the same “tie” they had found in the

⁴⁶ *See generally id.*

⁴⁷ *Id.* at 1627.

⁴⁸ *See id.* at 1624; *Carhart I*, 530 U.S. at 921–22.

⁴⁹ *See, e.g., Carhart II*, 127 S. Ct. at 1621–23, 1627, 1629, 1631–32, 1634–35.

⁵⁰ *Id.* at 1629 (emphasis added).

⁵¹ *See id.* at 1629–31.

⁵² *See id.* at 1632, 1636–37.

earlier case.⁵³ The physician-plaintiffs showed substantial medical authority that the law shamefully endangered women, including again the American College of Obstetricians and Gynecologists,⁵⁴ as well as physicians, including the plaintiffs themselves, from leading medical schools across the country.

But the government showed disagreement, creating that “tie.” Again, the government’s burden was not nearly as heavy as the physician-plaintiffs’. The government didn’t have to show substantial medical authority. All they had to show was disagreement, which they did: they showed some doctors who disagreed with the plaintiffs’ substantial medical authority. So far this sounds like *Carhart I*, which struck the Nebraska law. However, in *Carhart II* the Court changed the rules.⁵⁵ A “tie” no longer goes in favor of women’s health. The Constitution no longer requires us to err on the side of making sure women are safe. Now, in the presence of a “tie,” Congress can ban whatever it decides to ban.

Most appallingly, to my mind, the Court wrote that “if some procedures have different risks than others, it does not follow that the State is altogether barred from imposing reasonable regulations.”⁵⁶ In other words, if procedure A is riskier than procedure B, that alone does not stop Congress from banning B, forcing women to undergo the riskier procedure A.

There are other places in the decision that imply that the Court perhaps didn’t believe there was actually a difference in safety at issue in this case.⁵⁷ This sentence says, however, that as a constitutional matter, it would not matter if there were.

So in light of what seems to be a clear change in the rules—a “tie” no longer goes in favor of women’s health—the Court’s statement that it overturned no precedent is, as I said before, a

⁵³ *See id.* at 1635–37.

⁵⁴ *See* Brief for ACOG as Amicus Curiae Supporting Respondents, *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (Nos. 05-380, 05-1382), 2006 WL 2867888.

⁵⁵ *See Carhart II*, 127 S. Ct. at 1637.

⁵⁶ *Id.* at 1638.

⁵⁷ *See id.* at 1632, 1635–36, 1637.

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stretch.⁵⁸ It’s tough to square the health exception holding in *Carhart II*, which upheld the Federal Abortion Ban, with thirty years of precedent from *Roe*⁵⁹ and *Doe*⁶⁰ to *Colautti*⁶¹ and *Danforth*⁶² and *Thornburgh*⁶³ and *Casey*⁶⁴ and *Carhart I*,⁶⁵ which made clear that the state cannot endanger women when it regulates abortion, and that the physicians’ paramount consideration must always remain the woman’s health. It is tough to square, but that’s what the Court said—that it was just applying the same *Casey* undue burden standard that the Court had applied in *Carhart I*.⁶⁶ Again, inasmuch as that is what the Court said, it is the job of advocates for reproductive justice to insist every way we can that the health-protective language in those prior cases remains good law.

What about Justice Scalia? Recall that in *Carhart I*, his dissent agreed with the majority of the Court on one point: that *Casey* required striking the Nebraska ban (meaning, in Scalia’s view, that *Casey* should be overturned).⁶⁷ So where was he in *Carhart II*, where Justice Kennedy wrote an opinion reasoning that the federal ban should be upheld because it was perfectly consistent with *Casey*? Did Scalia write a separate opinion, clarifying that the federal law should be upheld, but that doing so was inconsistent with *Casey*?

No, he didn’t, and one might wonder why: why would Justice Scalia write the dissent he wrote in *Carhart I*, and yet sign on to

⁵⁸ *Id.* at 1632, 1636–37.

⁵⁹ *See Roe v. Wade*, 410 U.S. 113, 150, 163–64 (1973).

⁶⁰ *See Doe v. Bolton*, 410 U.S. 179, 192 (1973).

⁶¹ *See Colautti v. Franklin*, 439 U.S. 379, 387, 400–01 (1979).

⁶² *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 78–79 (1976).

⁶³ *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 770–71 (1986).

⁶⁴ *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860, 879–80 (1992).

⁶⁵ *See Carhart I*, 530 U.S. 914, 936–38 (2000).

⁶⁶ *Carhart II*, 127 S. Ct. 1610, 1636–37, 1639 (2007).

⁶⁷ *Carhart I*, 530 U.S. at 953–55 (Scalia, J., dissenting).

the opinion Justice Kennedy wrote in *Carhart II*? Maybe he had just been reading Emerson early in 2007, something about a foolish consistency being the hobgoblin of little minds?⁶⁸ But perhaps—and this is pure speculation on my part—it has something to do with someone on the Court wanting a clean 5-4 decision, with a clear majority behind the reasoning, rather than a splintered decision.

A final point on precedent: like the question of why Scalia didn't write separately in *Carhart II*, I am happy to hazard guesses as to why the Court was so dismissive of women's health, and yet said that it overturned none of the precedent that is so protective of women's health. While that seeming oddness is galling and scary, the scariest thing is how the Court referred to *Casey* as authority. In 2003, Justice Kennedy's opinion for the Court in *Lawrence* had quoted *Casey* so appreciatively, but the opinion he wrote for the Court in *Carhart II* refers to *Casey* as follows: "Under the principles accepted as controlling here"⁶⁹ Accepted by whom? Accepted as controlling? Not reaffirmed, let alone strongly reaffirmed, as the Court had done in *Carhart I*?⁷⁰ No, none of that. "Under the principles accepted as controlling here," the federal ban "would be unconstitutional" if it violated *Casey*'s undue burden standard.⁷¹ Yikes!

So I want to leave you with two points about the grounds on which the *Carhart II* Court upheld the law—the state interests that the Court said justified this ban. The first is the Court's statement that "the government 'has an interest in protecting the integrity and ethics of the medical profession.'"⁷² I would have thought that protecting the integrity of the medical profession meant making sure doctors can always practice with their patients' best medical interests at heart. But you know, they didn't consult me

⁶⁸ See RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST SERIES* 45, 58 (1841).

⁶⁹ *Carhart II*, 127 S. Ct. at 1632.

⁷⁰ *Carhart I*, 530 U.S. at 931, 938.

⁷¹ *Carhart II*, 127 S. Ct. at 1632.

⁷² *Id.* at 1633 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

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when they wrote this opinion. The terrifying thing is that a state interest in protecting medical ethics is potentially limitless as a justification for banning modes of abortion, as this ban purported to do. If the fact that some people think a particular procedure or variant of a procedure is ugly, shocking, or disturbing is enough to ban that procedure, then the right to abortion will soon be gone, because there is no procedure that’s not disturbing to some people. But whether some or even many people are disturbed is not the measure of constitutional rights. If it were, the notion of constitutional rights as protected from majoritarian sentiment would be meaningless.

Second, in its discussion of state interests, the Court wrote, “Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well.”⁷³ The Court further stated, “While we find no reliable data to measure the phenomenon”⁷⁴ Okay. Any law student who has recently taken Evidence is familiar with the standards for admitting expert testimony set forth in *Daubert*⁷⁵ and *Kumho Tire*.⁷⁶ It is safe to say that the following statement by the Court does not reflect that jurisprudence: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort Severe depression and loss of self-esteem can follow.”⁷⁷

You’d think there would then be a citation to a learned treatise here, but no. Simply “unexceptionable to conclude.”⁷⁸ Now, I don’t in any way dismiss the experiences of some women that are very complicated after abortion. There are women who have spoken of extreme sadness. There are women who have

⁷³ *Id.* at 1634.

⁷⁴ *Id.*

⁷⁵ *See* *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) (setting standard for admissibility of expert testimony).

⁷⁶ *See* *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (applying standards articulated in *Daubert*).

⁷⁷ *Carhart II*, 127 S. Ct. 1610, 1634 (2007).

⁷⁸ *Id.*

abortions and are later depressed—which is not to say that abortion causes those experiences: the greatest indicator of whether you will suffer depression or other emotional health difficulties after an abortion is your vulnerability to, and experience of, those illnesses before the abortion.⁷⁹ But while I don't dismiss anybody's lived experience, the idea that abortion causes severe mental illness is so offensively lacking in evidentiary foundation that it is really hard to swallow.

But even more important in the Court's invocation of this so-called state interest is how the Court treats women's decision-making. Remember that other bouncing ball, aside from Justice Kennedy's vote? Women's decision-making was essentially invisible in *Roe*. We saw it in a complicated but nonetheless very beautifully articulated way in *Casey*.⁸⁰ And then here, in *Carhart II*, we see it trashed and denigrated, because it is women's very decision-making power that Justice Kennedy says women need to be protected from,⁸¹ citing women's need to be protected (by the state) from their own decisions as justifying this awful restriction.

This is, in sum, a very scary decision, and I leave it to my colleagues on this panel to tell us about the way forward from here.

⁷⁹ AMERICAN PSYCHOLOGICAL ASSOCIATION, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 68–70 (2008), available at <http://www.apa.org/releases/abortion-report.pdf>.

⁸⁰ See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

⁸¹ See, e.g., *Carhart II*, 127 S. Ct. at 1634.